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Case No.:_____

United States Supreme Court

October, 1982

Raymond L. Medlin, Appellant

v.

City & Borough of Sitka, Appellee

On Appeal from the Supreme Court
of the State of Alaska

Motion to Dismiss Appeal

Michael T. Thomas, Esq.
ROBERTSON, MONAGLE,
EASTAUGH & BRADLEY
P. O. Box 679
Anchorage, AK 99510
(907) 277-6693

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UNITED STATES SUPREME COURT

RAYMOND L. MEDLIN,	)
	)
Appellant,	)
	)
vs.	)
	)
CITY & BOROUGH OF SITKA,	)
	)
Appellee,	)
	)

MOTION TO DISMISS APPEAL

COMES NOW appellee, City and Borough of Sitka, defendant in the trial court, and, by and through its counsel, Robertson, Monagle, Eastaugh & Bradley, moves to dismiss the appeal filed by Raymond Medlin.

Appellant filed a complaint in the Superior Court for the State of Alaska, First Judicial District, on March 29, 1979. More than three years later, on April 26, 1982, appellant made a verbal request for a jury trial. Defendant objected. On April 26, 1982, the court set the matter for trial before the court, noting the absence of a timely demand for

a jury trial. A written demand for a jury trial was made on May 5, 1982. On May 11, 1982, the Superior Court, per Judge Craske, affirmed its order denying jury trial.

Appellant petitioned the Supreme Court of the State of Alaska for review of the order affirming denial of a jury trial. The petition for review was denied. Alaska Supreme Court Order 6904, dated September 20, 1982. It is this order from which appellant appeals.

The Seventh Amendment preserves the right to a jury trial, but this right may be waived by the parties. Colgrove v. Battin, 413 U.S. 149, 93 S.Ct. 2448, 37 L.Ed.2d 522 (1972); United States v. Moore, 340 U.S. 616, 71 S.Ct. 524, 95 L.Ed. 582 (1951); Kearney v. Case, 12 Wall. 275, 281, 20 L.Ed. 395 (1870).

Rule 38(b), Alaska Rules of Civil Procedure, provides:

> **DEMAND.** Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand shall be made in a separate written document signed by the party making the demand or by his attorney.
>
> Rule 38(d) provides:
>
> **WAIVER.** The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him or trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

The Rule thus requires an affirmative demand for a jury trial within the time period set forth.

In the case at bar, appellant did not make a timely demand for a jury trial, nor has appellant made a showing in the trial court, the Supreme Court of the State of Alaska, or in this Court of any reason that such failure should be excused. Appellant has thus waived any

right to a jury trial. Krodel v. Houghtaling, 468 F.2d 887 (4th Cir. 1972), cert. denied, 414 U.S. 829, 38 L.Ed.2d 64, 94 S.Ct. 57 (1973); Wilson v. Corning Glass Works, 195 F.2d 825 (9th Cir. 1952); United States v. Moore, supra, on remand, Moore v. United States, 196 F.2d 906 (5th Cir. 1952). (Although the above cases interpret the Federal Rules of Civil Procedure, Rule 38(b) and (d), Alaska Civil Rule 38(b) and (d) is similarly worded.) See also Ward v. Brown, 301 F.2d 445 (10th Cir. 1962): an oral application for permission to file a written demand for a jury trial does not comply with the rule requiring that the demand be served ten days after service of the last pleading directed to the issues.

Furthermore, the question presented in this appeal is moot. On November 2, 1982, the Superior Court for the State of Alaska, First Judicial District, per Judge Craske, granted

appellee's Motion for Summary Judgment and dismissed plaintiff/appellant's complaint. See copy attached. Thus, there will be no trial, either by court or by jury.

Since appellant's waiver of its right to a jury trial was effective, and since in any event the issue is moot, the appeal in this case should be dismissed.

Respectfully submitted this 22nd day of November, 1982.

ROBERTSON, MONAGLE, EASTAUGH & BRADLEY

By _____
Michael T. Thomas
Of Attorneys for Appellee
City and Borough of Sitka

ROBERTSON, MONAGLE, EASTAUGH & BRADLEY
ANCHORAGE

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT SITKA

RAYMOND L. MEDLIN,

Plaintiff,

vs

CITY AND BOROUGH OF SITKA,

Defendant.

FILED in the Trial Courts
State of Alaska, First District

NOV 2 1982

Clerk

By _____ Deputy

No. 1SI-79-86 CIV

ORDER OF DISMISSAL

Defendant has moved for a summary judgment and plaintiff has opposed. On November 1, 1982 the court's findings of fact and conclusions of law were orally entered on the record, now therefor

IT IS HEREBY ORDERED:

1. That defendant's motion for summary judgment is granted and the complaint is dismissed.

2. That Civil Rule 79 application for costs shall be made within ten (10) days.

3. That Civil Rule 82 application for attorney fees shall be made within ten (10) days.

ISSUED this 2 day of November, 1982.

Duane Craske
Superior Court Judge

CERTIFICATION

The undersigned certifies that on the 3 day of NOVEMBER, 1982 a true copy of the document was mailed to the following attorneys:

MICHAEL T. THOMAS, ESQ.
RAYMOND L. MEDLIN
BY [signature]

Cal 11/9/15

Alaska Court System
State of Alaska